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Supreme Court of the United States.

OCTOBER TERM—1930.

No. 448

AARON PRUSSIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM—1930.

No.

AARON PRUSSIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Aaron Prussian respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The petitioner was convicted in the United States District Court for the Eastern District of New York for falsely forging an endorsement upon a genuine government draft. The draft was in payment of certain income tax refunds due to the estate of Jennie E. Mackay obtained by the petitioner as the attorney for the administrator, Malcolm S. Mackay. The petitioner was charged with a violation of Title 18, United States Code, Section 262, 148 U. S. C. C. (R. 9). Upon conviction, the Court sentenced the petitioner to five years in the penitentiary and Two hundred ($200) Dollars fine (R. 129). An appeal was prosecuted to the Circuit Court of Appeals of the Second Circuit and the judgment

of conviction affirmed by that Court on the 30th day of June, 1930.

The facts in the case are not complicated nor are they in dispute. The petitioner, Aaron Prussian, a graduate of Harvard University Law School in 1912, was admitted to practice in the Treasury Department of the United States as tax counsellor in the year 1921 (R. 95). In the Fall of 1924, the petitioner was a member of the law firm of Kay & Kay in Washington. With one Kay, he called at the office of John E. Miller, attorney for Malcolm S. Mackay, who was the administrator of the estates of Jennie E. Mackay and Duncan Mackay, and informed Miller that the Mackay estate had a claim against the Government for overpayment of taxes and that certain refunds could be obtained (R. 21, 96). Miller told them that he would inquire into the merit of the matter. In January, 1925, Prussian discontinued his association with Kay & Kay (R. 107) and at the same time informed Miller that the Statute of Limitations would soon bar the refund claim belonging to the estate (R. 96). Miller finally told the defendant to prepare all the papers and he would submit them to Mr. Mackay. There is no dispute and it is conceded that Malcolm S. Mackay, the administrator, authorized Miller to employ Prussian to present the matter to the Government (R. 66).

The written retainers duly signed and executed by Malcolm S. Mackay, as administrator, on February 27th, 1925, provided for the employment of Prussian to obtain refunds of taxes in both the Jennie E. Mackay and Duncan Mackay estates (R. 139, 140). On the same day, the defendant received from Mackay a general power of attorney (R. 131), which power was filed in Washington by Prussian and pursuant to such power he appeared

for the Mackay estate (R. 28, 99). The first refund obtained by Prussian was in the Duncan Mackay estate amounting to about Sixteen hundred ($1600) Dollars (R. 99). The draft of that sum was sent directly to Mr. Mackay (R. 30). Prussian was never paid his fee in that case, although he had prosecuted the claim successfully, because, as Miller claimed, the firm of Kay & Kay had notified Miller that in the event of the payment of the fee to Mr. Prussian, they would hold Mackay liable on a *quantum meruit* for services rendered (R. 38, 98). Despite Prussian's offer to give Mackay a bond to protect him against any lawsuit by Kay & Kay, the defendant never received his fee in the Duncan Mackay estate (R. 30).

In January, 1926, Prussian informed Mackay that a refund had been allowed in the Jennie E. Mackay estate and that the total recovery would be Nine thousand two hundred twenty-four and 37/100 ($9,224.37) Dollars (R. 141). On April 2nd, 1926, Prussian informed Miller that the refund check was in the office of the Collector of Internal Revenue in Newark awaiting issuance upon receipt back by Mackay of a statement that there were no outstanding income tax liabilities on the part of the estate (R. 142). Thereafter on the 6th day of April, 1926, the defendant called at the office of the Collector in Newark and inquired about the check. He was told that the draft was in the office but that it could not be released unless a power of attorney was filed (R. 54, 55). It is to be remembered that Prussian already had filed in Washington a general power of attorney given to him by Mackay in 1925. No copy of such power, however, had been filed in Newark (R 99). Prussian instructed his secretary to make a copy of the power of attorney and to have it executed by Mackay. Instead of doing

this, she copied a form of a power of attorney from the Prentice Hall Tax Service and took it to the office of Mackay, who signed it. In connection with this power of attorney it is important to remember that it was prepared, not by Mackay nor at his request or dictation, but by a member of Prussian's office (R. 26). Secondly, the power of attorney given to Prussian on April 6th, 1926, was not intended to limit the general power of attorney which he had received in February, 1925, but was given to him merely to collect the check (R. 31).

The very next day, April 7th, Prussian informed Mackay's secretary, who was Miller's brother, that he had obtained the check and would be glad to deduct his fee in both the estates and send them the difference. This was refused and Miller insisted upon the payment of the entire amount of the check before considering the question of fees (R. 101, 102). On the same day, Prussian, in the presence of one, Buckman, a Government witness, endorsed the check by signing Mackay's name; then his own, as attorney; and then his own, individually (R. 104). It is important to remember that this testimony, relative to the signing of all three signatures at one time before Buckman, is corroborated by the latter's own testimony on direct examination (R. 61). Moreover, Prussian's testimony on that point remained uncontradicted since the Government witness, Buckman, was not called in rebuttal. All this testimony, although undisputed by both sides, was totally disregarded by the Circuit Court. Can there be a forgery where the signature alleged to be simulated was written in the presence of the party to whom the draft was assigned and known by that party, a Government witness, to be Prussian's writing and not the payee's?

A sum of money considerably less than Prussian's

agreed fee, which was 25% and not 15% as stated in the opinion of the Circuit Court (R. 139), was paid to Buckman for a debt then due to him by Prussian (R. 67). The proceeds of the check, less Prussian's fee, were offered to Miller a number of times and, on his refusal to accept anything less than the full amount, were deposited at the office of a reputable law firm in New York City who are authorized to pay out that money upon request (R. 105).

It is to be noted that Prussian never denied that he signed Mackay's name and his own, as attorney, to the back of the draft (R. 36), nor did he deny any of the facts in the case (R. 137). It is submitted that this Court will find in its reading of the record in this case that the action herein is the result of persistent persecution by a disgruntled client.

Reasons Relied on for the Allowance of the Writ.

I. It is submitted that the Circuit Court erred in holding that an endorsement upon a genuine Government draft is "an obligation or security of the United States" within the meaning of Sections 147 and 148 of the Penal Code (Title 18, U. S. C. A., Secs. 261, 262). This question has not heretofore been decided by this Court although in *Dunbar* v. *United States*, 156 U. S. 185, this Court held at page 190 that the purpose of the sections herein involved is the protection of the bonds or currency of the United States and not the punishment of any fraud or wrong upon individuals. The Circuit Courts are in hopeless conflict on this point. The Circuit Court in this case followed the Fifth Circuit in holding that Section 148 was applicable to an endorsement on a gen-

uine Government draft. The indictment in this case is worded in accordance with that opinion. The Eighth Circuit, however, has twice held in *Lewis* v. *U. S.* (1925), 8 Fed. (2nd) 849, and *Gesell* v. *U. S.* (1924), 1 Fed. (2nd) 283, that an endorsement is not an "obligation or security of the United States" and that an indictment such as we have here which charges the forging of an endorsement upon a Government draft, is not punishable under the Federal Penal Code. The latter cases specifically mention and discuss the conflicting decisions of the Fifth Circuit. It is vital that these irreconcilable opinions be finally passed upon by this Honorable Court. Is the Government an interested party if an endorsement is forged upon a genuine draft issued to an agent of the payee authorized to receive it? Can it be said that Congress intended Sections 147 and 148 to apply to such a situation?

II. The petitioner was convicted of a crime he never committed. The undisputed testimony, as presented by the Government, showed that the petitioner was the duly authorized agent of Mackay to receive the check. Secondly, all the endorsements were made *in the presence of* the man to whom the draft was assigned. He knew it was Prussian's act—and no one else's. In affirming the judgment of conviction for forgery, the Circuit Court completely disregarded the practically unanimous decisions of state and federal jurisdictions in America and of the courts in England to the effect that a false statement of fact in the body of an instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person may possibly be deceived and defrauded, is *not* a forgery—although it may be some other offense. *Commonwealth* v. *Baldwin*,

11 Gray 197, cited with approval in *White* v. *Van Horn*, 159 U. S. 3, at page 18.

The draft that the petitioner handed to the transferee was not falsely made or forged. The endorsements were exactly what they purported to be—Prussian's own signatures. He never attempted to pass the signature as that of another. Buckman, the Government witness and assignee, saw him sign all three signatures (R. 61, 104) on the draft. No matter how these were written, even if we disregard and disbelieve the petitioner's explanation of the difference in signatures, the only possible falsity, if there was any, consisted in the petitioner's assertion that he had the power to bind Mackay by the endorsement. Such an offense belongs to an entirely different class of crimes, not cognizable in the Federal courts.

III. The Circuit Court erred in holding that the petitioner did not have the authority to endorse the draft in the name of Mackay. Again, the Court chose to ignore the unhesitant testimony of the grantor of both powers of attorney that the second power was not intended to limit the general powers of the attorney under the first. It was given merely to facilitate obtaining the check and neither party ever intended it to have any other effect. Under such circumstances, *Bailey* v. *U. S.* (1926), 13 Fed. (2nd) 325, was directly in point and not, as the Circuit Court held, distinguishable. In line with the authorities that case holds that an attorney has implied authority to indorse a check or draft made payable to his client, where, as in this case, there is no testimony tending in any way to limit or restrict the implied authority arising from the contract of employment.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled *United States of America, Plaintiff-Appellee, against Aaron Prussian, Defendant-Appellant,* and that the said judgment of conviction may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

AARON PRUSSIAN,
Petitioner,
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September, 1930.

Supreme Court of the United States

OCTOBER TERM—1930.

AARON PRUSSIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 148) is still unreported. The decision was handed down by the Circuit Court on June 30th, 1930.

Jurisdiction.

The order for mandate of the Circuit Court of Appeals for the Second Circuit was entered on July 7th, 1930 (R. 151). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Statutes Involved.

Section 147 of the Criminal Code (Title 18, U. S. C. A., Sec. 261) provides as follows:

> The words "obligations or other security of the United States" shall be held to mean all bonds,

certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress.

Section 148 of the Criminal Code (Title 18, U. S. C. A., Sec. 262) provides as follows:

> Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years.

Statement.

A statement of the facts and of the errors relied on will be found in the petition.

Argument.

POINT I.

The indictment states no offense within Criminal Code, Section 148 (Title 18, U. S. C. A., Sec. 262), since an endorsement on a genuine draft is not an "obligation or security of the United States".

Lewis v. *U. S.* (1925, C. C. A. 8th), 8 Fed. (2nd) 849;

Gesell v. *U. S.* (1924, C. C. A. 8th), 1 Fed. (2nd) 283;
U. S. v. *Albert* (1891, D. C. Fla.), 45 Fed. 552;
Dunbar v. *U. S.* (1895), 156 U. S. 185, 15 S. Ct. 325;
22 Opinions of Attorney-General 40 (1897-99);
De Lemos v. *U. S.* (1899, C. C. A. 5th), 91 Fed. 497.

The determination of the question here presented involves a consideration of several sections of the Criminal Code. It was pointed out in *Gesell* v. *U. S.*, 1 Fed. (2nd) 283, that the words "obligation or security" are in themselves general terms, and are used in a series of sections relating to the same general category of offenses. Immediately preceding Section 148 of the Criminal Code, however, we find Section 147 (Title 18, U. S. C. A., Sec. 261), which with precision defines and quotes this very expression. This section enumerates the different classes of obligations and securities which the words quoted in said section and used in the succeeding sections, "shall be held to mean".

Sections 147, 148 and 151, respectively, were taken from Sections 5413, 5414 and 5431 of the Revised Statutes of the United States. The provisions of Section 147 have been held to apply, in their construction, to the succeeding sections in the Criminal Code. 22 Opinions of the Attorney General 40.

The Supreme Court in *Dunbar* v. *U. S.*, 156 U. S. 185, page 190, has stated that the purpose of Section 5431 (now Sec. 151 of the Penal Code) is the *protection of the bonds or currency of the United States and not the pun-*

ishment of any fraud or wrong upon individuals. It will be noted that in this case the draft, drawn by an authorized officer of the United States, was genuine. The only "obligation or security of the United States" which this indictment and the proof attempts to show was forged, is the endorsement on the back of the genuine draft.

In *Gesell* v. *U. S.*, 1 Fed. (2nd) 283, the Court said (p. 285):

> "Now section 147, after enumerating the particular 'obligations and securities' which the quoted expression 'shall be held to mean' does *not* say 'or any assignment or indorsement thereof' or use any equivalent expression. *And we must not lose sight here* of the fact that we are dealing with criminal statutes, and that in those portions of their contexts which define the offense they should be strictly construed."

In New York, for example, the Penal Code expressly provides by a *separate section* that one is guilty of forgery in the first degree who forges "an endorsement * * *, transferring * * * the right of interest of * * * a certificate, obligation * * *" (New York Penal Code, Sec. 884, subd. 4).

The Circuit Court followed *De Lemos* v. *U. S.*, 91 Fed. 497, and those cases in line with that opinion. This was a decision of the Fifth Circuit in 1899 in which the Court, while sustaining a demurrer to an indictment because of repugnant allegations in the various counts, expressed the opinion, by way of dictum, that a charge

could have been laid for forgery under Sections 5414 and 5431. The Court in the *De Lemos* case erroneously assumed that a genuine draft of the United States, if it has placed upon it a forged endorsement, may together constitute a forged obligation of the United States. In the Eighth Circuit, at a much later date, the Court said (p. 288):

> "*With this latter conclusion of the court in the De Lemos case we are not prepared to agree.* In this connection the court a little further on in the opinion pointed out the necessity of distinctly charging that the genuine draft with the forged indorsement upon it constitute together a forged obligation of the United States. Now, of course, if by mere assertion or averment the assignment, *which before was no part of the draft*, could be laid under section 5414, Rev. Stats. U. S. (now Criminal Code, Sec. 148), and by parity of reasoning in the present case the charge could be laid under Criminal Code, Section 151. *But this all assumes the identity of the original complete obligation and the independent assignment thereof.* We think this was not the intention of the Congress when it framed these three sections, each so well adapted to fill its peculiar niche, and, when taken together, so inclusive of the field under consideration and especially in view of section 5413, Rev. Stats. U. S. (now Criminal Code, Sec. 147), which so clearly and precisely defines and enumerates the particular instruments which the words 'obligations or security of the United States' then being considered 'shall be held to mean'." (Italics ours.)

Gesell v. *U. S.*, 1 Fed. (2nd) 283.

See also,

Lewis v. *U. S.*, 8 Fed. (2nd) 849.

Certainly it is incorrect to assert that a genuine draft or check is incomplete until it is indorsed. Nor does it follow that because a separate forged indorsement is placed on a genuine draft, that, thereafter, the two become a single forged obligation of the United States. On the contrary, it is a familiar rule of the law of negotiable instruments that whenever there has been a delivery of an instrument for the purpose of passing possession and control to the obligee, such instrument becomes a present and completed contract, regardless of its subsequent indorsement.

The conflict between the Eighth Circuit and those cases which follow it and the decisions of the Circuit Courts in the Fifth and Second Circuits is one that requires final settlement by this Honorable Court.

POINT II.

There was no evidence to sustain the conviction under the indictment and the forgery statute since the acts of the defendant did not constitute the crime of forgery.

Forgery is defined by Blackstone as "the fraudulent making or alteration of a writing to the prejudice of another man's right" (4 Bl. 247). It is defined by Blackburn, *J.*, as "the false making of an instrument to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements". (*In re Windsor,* 10 Cox

C. C. 118.) In our own country, it has also been precisely defined. In *Mann* v. *People* (1878), 15 Hun 155, aff'd in 75 N. Y. 484 (a leading case in New York), Westbrook, *J.*, said at page 166:

> "In other words, forgery is the attempted imitation of another's personal act, and by means of such imitation to cheat and defraud; *and not the doing of something in the name of another, which does not profess to be the other's personal act, but that of the doer thereof, who claims and insists by and in the act itself, that he is authorized to obligate the individual, whom he is assuming to obligate precisely as he undertakes to do.*"

The essence of the offense of forgery, therefore, is the making of a false writing with the intent that it shall be received as the act of another than the party signing it.

> 26 Corpus Juris, 898, Sec. 5;
> *Ex parte Geissler* (1912, D. C. N. Y.), 196 Fed. 168.

The indorsements on the back of the genuine draft in this case are as follows:

> (signed).....Malcolm S. Mackay.....
> (Sign on this line)
> Admr. Est. of Jennie E. Mackay
> Aaron Prussion, Atty.
> Aaron Prussian
> Pay to the order of
> Bank of Coney Island
> J. L. BUCKMAN

We have at the outset of this case this cogent evidence: First, Prussian had the authority to receive the

check, and secondly, he endorsed Mackay's name and then his own as attorney in Buckman's presence. The latter, of course, understood that in writing as he did Prussian was purporting to act for Mackay as his duly authorized agent (R. 61). Such an assumption of authority is clear from a reading of the back of the instrument itself.

The authorities are overwhelmingly to the effect that the unauthorized signing of another's name to an instrument as his agent for fraudulent purposes does not constitute forgery, though it may be some other crime.

Commonwealth v. *Baldwin* (1858), 11 Gray 197, 71 Am. Dec. 703;

Mann v. *People* (1878), 15 Hun 155, aff'd 75 N. Y. 484;

International Finance Corp. v. *People's Bank* (1928, D. C. W. Va.), 27 Fed. (2nd) 523, aff'd (1929, C. C. A. 4th) 30 Fed. (2nd) 46;

Ex parte Geissler (1912, D. C. N. Y.), 196 Fed. 168;

In re Tully (1884, C. C. N. Y.), 20 Fed. 812, 22 Blatchf. 213;

U. S. v. *Wentworth* (1882, C. C. N. H.), 11 Fed. 52;

People v. *Bendit* (1896), 111 Cal. 274, 43 Pac. 901;

Barron v. *State* (1913), 12 Ga. App. 342, 77 S. E. 214;

In re Heilbonn (1853), 1 Park. Crim. Rep. (N. Y.) 429;

Ex parte Offutt (1925), 29 Okla. Crim. Rep. 401, 234 Pac. 222;

State of North Carolina v. *Lamb* (1930), 198 N. C. 423;

Regina v. *White* (1847), 2 Car. & K. 404.

In *Mann* v. *People,* 15 Hun 155, the defendant, a county treasurer, executed and issued a pretended county obligation purporting on its face to be executed by him as agent of the Board of Supervisors of the County of Saratoga. He had no such authority and appropriated the money to his own use. The lower Court said, at page 162:

> "The instrument in question purported to be the act of Henry A. Mann. It may be that it purported to be legally binding on the County of Saratoga. But the *act*—that is, the doing the physical act as distinct from the legal effect—was the act of the prisoner. There is undoubtedly a sense, as urged by the counsel for the people, in which such an instrument may be said to purport to be the act of the county. But that is a statement of the legal effect. As a matter of fact, the instrument purports to be the act of Mann. He signed it in his own name, adding the title of his office—an office which he legally held."

As pointed out in the *Mann* case, it is to be noted that in all cases of alleged forgery, a substantial difference may be traced. Did the person who is accused of crime put forth the instrument with the fraudulent pretense that, as issued, it was written or signed by some person other than himself, or did he plainly state that he was the writer or signer, but falsely assert at the same time therein that his act was obligatory on some other person? In other words, was the wrong done by means of a false representation, written or oral, as to his authority to bind another? These two classes of acts seem to be essentially different. "Telling a lie does not become forgery because it is reduced to writing." *In re Tully,* 20 Fed. 817.

In *Regina* v. *White*, 2 Car. & K. 404, the prisoner was charged with endorsing a check without authority "Per procuration, Thomas Tomlinson, Emanuel White" in the presence of the indorsee. It was argued for the prisoner that the writing was not made as the writing of another, but avowedly that of the prisoner himself; and though he might have committed fraud in saying that he was authorized to make the endorsement, that was not a forgery but a mere false pretense. The fifteen judges then sitting unanimously concurred in holding that a conviction for forgery in such a case was wrong.

The soundness of the decision in *Regina* v. *White*, in deciding that there could be no forgery where the act charged did not purport to be the act of any other than the prisoner, has never been questioned and the case has been consistently followed in America, as well as in England. *People* v. *Bendit*, 111 Cal. 274. Of particular interest in this connection is the passage of the Forgery Act of 1861 (Stat. 24 & 25 Vict. Chap. 98, Sec. 24), after the decision in *Regina* v. *White*, which made it a felony "to indorse * * * any Bill, note, or other Security for Money, by procuration or otherwise, for, or on account of any other person * * *".

When, therefore, Prussian signed the name of Mackay and his own as attorney, holding himself out to Buckman, by such writing, as the duly authorized agent of Mackay, even if such representation was false, his prosecution under a forgery statute of the United States cannot be sustained. Nor can it be argued that because the signatures of Mackay and Prussian do not seem to be the same, that a different rule of law may be predicated on that fact alone. The fact remains that Buckman was not for one moment misled into believing that the signature

was the genuine act of Mackay, but knew that Prussian had signed the instrument as attorney, upon which representation of authority he placed his reliance. There was no false writing here. The falsity, if there was any, lay in the misrepresentation of authority. The intent in forgery is different from the intent to obtain money under false pretenses. The intent to defraud must be to defraud by means of the false writing; if there is no false writing, the intent to defraud cannot make it forgery. Certainly the trial Court or Circuit Court in every case should not be left to determine whether a forgery has or has not been committed when one signs the name of another *as agent, purporting to have such authority*, by seeing whether the signatures are alike or whether they are different, no matter how innocent the reason for their difference. To assert such a rule is to fail to distinguish between the essence of the crime of forgery and the essence of the crime of obtaining money by false pretenses.

The falsity of the act of writing another's name to constitute forgery must consist in the intent that it shall pass and be received as the act of the other party. To argue that third parties may be deceived, though Buckman was not, is to beg the question. If the writings were genuine and known to be such by Buckman, if he relied solely on Prussian's authority to bind Mackay, then the injury he suffered was by reason of the false representation and anyone else, if they were injured, suffered for the same reason. What Prussian wrote was his genuine act and so whether third parties were defrauded or not, it would not be forgery. If it was not forgery at the time the instrument was passed to Buckman, it could not be thereafter. Suppose Prussian had had the undisputed authority at that time to sign Mackay's name?

Or the proof showed that the signature was an absolute innocent act? Would such writings, thereafter, become forgeries merely because some third party saw a difference in the handwritings? Reduced to such an absurdity, the answer to these questions seems plain enough.

In the *Heilbonn* case, 1 Park, Crim. Rep. (N. Y.) 429, not only was there affirmative proof of attempted simulation with resultant differences in handwriting, but the defendant actually stole the draft, a situation which does not exist in our own case. In holding that the offense of forgery had NOT been committed under circumstances similar to our own, the Court said:

> "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off *as the signature, or counterfeit of that other.* This cannot be when the party openly, and on the face of the paper, declares that he signs for the other, there he does not counterfeit the name of the other, nor attempt to pass the signature as the signature of that other. *The offense belongs to an entirely different class of crime* * * *." (Italics ours.)

The consistent holdings by eminent jurists and courts of various jurisdictions that the endorsing of another person's name as agent or attorney is not a forgery, has made it the settled law of this country. Petitioner strenuously contends that the prosecution in this case should not have been under a forgery statute, but, if there was any fraud committed, the prosecution should have been under the State statutes especially designed to make criminal other frauds, cheats and false pretenses which are not forgery. Justice could be amply accom-

plished by such prosecutions. It is to be remembered that forgery is a grave crime. No matter how small the amount involved, forgery is always made a felony. But obtaining money or other property by false pretenses, where the party defrauded gives credit, not to the genuineness of a writing but to the person who deceives him, is made a misdemeanor or felony, according to the amount of money involved. In forgery, motive and intent are of little consequence. But in such crimes as larceny, embezzlement, obtaining money by false pretenses, the element of intent plays an important part in the trial of the defendant and the latter may be able to show circumstances to prove his innocence, which circumstances might be totally disregarded by a jury in a trial for forgery.

> "The broad and well established distinctions above set forth cannot be ignored by courts or jurors—even when in their opinion a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty. As was said in *Mann* v. *People, supra*, 'whatever his misdeeds, he must not suffer for a crime which he has not committed'."
>
> *People* v. *Bendit*, 111 Cal. 274.

And in Rex v. *Arscott* (6 Carr. & Payne 408), in concurring with Littledale, *J.*, that forgery had not been committed under circumstances similar to the one here involved, Vaughan, *J.*, said:

> "I am of the same opinion and I think it is much better that the most guilty offender should escape than that the law should be strained to meet any particular case."

POINT III.

Prussian had the implied and express authority from the undisputed evidence to indorse the draft in the name of Mackay and such act did not constitute forgery.

As has been heretofore stated, Prussian was retained by Mackay to obtain a refund of taxes paid by the estate to the Government (R. 66). Miller and Mackay knew nothing about the manner of the collection of such refunds from the Treasury Department. So it was, that when Prussian was retained, he was given a general power of attorney to prosecute the claim and to obtain the largest amount of money in refund. This power of attorney (R. 130) reads in substance as follows:

> "I, Malcolm S. Mackay * * * have made, constituted and appointed * * * Mr. Aaron Prussian * * * my true and lawful attorney for me and in my name, place and stead, to represent me and act for me in connection with all matters in any way relating to the Federal Income Tax return * * * to represent me and act for me in prosecuting a claim for refund * * * giving and granting unto my said attorney, full power and authority to do and perform all and everything requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present * * *."

This power of attorney was given on February 27th, 1925, and it is to be noted, was never revoked thereafter (R. 99).

There can be no dispute that an attorney to whom a

claim has been given for collection is thereby duly authorized to receive the amount due thereon from the debtor and as an incident thereto, possesses the power to endorse a draft given in payment.

Bailey v. *U. S.* (1926, C. C. A. 9th), 13 Fed. (2nd) 325;
National Bank of the Republic v. *Old Town Bank* (1902, C. C. A. 7th), 112 Fed. 726;
Brown v. *Grimes* (1921), 74 Ind. App. 655.

We have seen that Prussian prosecuted the claim in the Jennie E. Mackay estate to a successful conclusion (R. 99). He was authorized to receive the draft as a means of procuring payment of the refund (R. 31). He acted both as attorney and attorney in fact for Miller in a difficult tax proceeding. Having taken the draft in the due course of his employment, he certainly had the authority to make a formal endorsement in behalf of Mackay for the purpose of receiving the money then due him. That this would be a logical incident to his power to collect the refund and the draft cannot be doubted. We have pointed out that Prussian honestly believed he had the authority to make the endorsement and that the amount of the refund, minus his legitimate fees, were offered back to Mackay by Prussian and when refused, placed on deposit with a New York City law firm (R. 105). As a matter of fact, to have held the instrument for any length of time without cashing it might have made him chargeable with negligence in the performance of his professional duties.

It will be noted that in all the above cited cases, there is no question of the power of an attorney to transfer a draft or check received in payment so that he may

collect money for his client. The problem of the disposition of the money thereafter becomes one between the attorney and client. If there is an actual conversion, the attorney may be prosecuted for embezzlement. If there is a dispute as to the amount of the fee, a civil action between the parties will usually determine their right. But the drawer or maker is protected. When we consider that the general power of attorney was always on file in Washington where the draft was payable, and that Prussian was the undisputed agent of Mackay to receive the check, there can be little doubt that if a suit were instituted against the Government to recover the amount of the draft, the paid check or draft, with the endorsement thereon, would constitute a full and complete defense.

That the trial Court was aware of the weight of authority in appellant's favor is evident from its charge.

> "Ordinarily if he was employed by Mackay to collect it (referring to the check), that would carry with it the authority to sign Mackay's name."

Appellant is certain that no question would have been raised as to Prussian's authority to endorse Mackay's name to the draft if it had not been for the second power of attorney which is almost an exact copy of the first power of attorney except that it contains the additional clause empowering Prussian to receive but not to endorse checks. It is extremely vital, in this connection, that the circumstances under which this power of attorney was given, the conduct of the parties and their intention at the time the instrument was given, be carefully considered. The evidence at the trial clearly

showed that the second power of attorney was merely given to Prussian to facilitate his getting the check on file in Newark and was not intended to limit, in any way, his authority under the first power of attorney. This testimony came, not from Prussian, but from the party who gave the power, the Government witness (R. 31). Neither party considered the second power any more than a mere formality necessary for obtaining the draft. This evidence bearing on the intention of the parties should not have been disregarded by the Court or jury, as was done in this case (R. 128). In the case of *In re Tidewater Coal Exch.* (1923, D. C. N. Y.), 292 Fed. 225, Judge Learned Hand said (p. 232):

> "Nevertheless, it is always necessary to know what conduct the parties had in mind when they used the words chosen for the promise. Nor is there any limitation whatever on the right of a court to hear any facts which will throw light on what that conduct was. Wigmore, section 2470. The ancient statements of the books that a document must be read within its four corners is no longer the law and has not been for a century. Words must always be translated into things or conduct, and they cannot be unless the setting is in proof in which they are used. * * *
>
> I am free therefore to read this language as referring to that conduct which the parties must have intended, regardless of its correspondence with the common use of the words chosen."

What did the parties intend? What were the circumstances that surrounded the giving of the second power of attorney? We refer the Court to the testimony of *both* parties to the controversy. Such evidence bears repetition. Miller testified that the first power of at-

torney was given by him together with the retainers to Prussian. That was in February, 1925 (R. 28). Pursuant to that power filed in Washington, Prussian appeared for the Mackay estate. On April 6th, 1926, almost a year later, Prussian went to Newark for the draft (R. 51). He was told he would have to file another power of attorney in Newark. There was no special form necessary. Prussian instructed his secretary to prepare a copy of the power of attorney then on file in Washington. Instead of making an exact copy, she prepared another form of power of attorney which she took from the Prentice Hall Tax Service (R. 99). The very fact that the two papers are almost identically alike in language indicates that they were copied from a form book and the additional clause inadvertently inserted. Miller testified that Prussian, and not he, drew the second power of attorney (R. 26). Is it reasonable to suppose, at the outset, that Prussian himself would have limited his own powers—when no such specific limitation in the power of attorney was required at Newark?

But all this evidence shades into significance when we consider Miller's testimony with regard to the instrument given to Prussian in 1926. In reciting this testimony, appellant wishes to point out to the Court that this is not the testimony of Prussian, the grantee, but the evidence offered by the Government from the lips of Miller himself (R. 31):

> "Q. Did you give this second power of attorney marked Exhibit 2 for the purpose of limiting this first power of attorney? A. *No, I gave him that to collect the check.*
>
> Q. I see, and there was no intention of limit-

ing the first power by that second power of attorney? A. What?

Q. There was no intention of limiting the first power of attorney by that second power of attorney? A. No."

Where is there a scintilla of evidence in the entire record to show that *either* party intended to limit Prussian's authority under the first power of attorney? And we have already pointed out his implied authority to endorse the draft under that power.

In *Bailey* v. *U. S.*, 13 Fed. (2nd) 325, the facts were precisely the same as in our own. A check or draft payable by the United States through its Treasurer to the order of one, Hochrey, as administrator, came into the possession of Bailey, as attorney for the estate. Bailey endorsed the check or draft in the name of the administrator, adding his own name to the endorsement. He then deposited the check or draft to his own account in the bank. This occurred early in the year 1922 and Bailey did not account to the administrator until some time early in the year 1925, when he was called upon by a special agent of the Government. Bailey admitted that the endorsement was his and later on an indictment containing two counts, charging him with forgery, was returned against him. On appeal, one of the assignments of error was the insufficiency of the testimony to support the verdict and judgment. In holding that no crime had been committed, the Court said:

"On the other hand, if the plaintiff in error had implied authority to indorse the check or draft arising out of his employment, there was no forgery of the indorsement, no uttering or publish-

ing of the forged instrument, and no offense against the laws of the United States, whatever crime may have been committed against the laws of the state.

We think the latter view is the correct one."

If, then, Prussian had the implied authority to endorse the draft, and if this implied authority, reaffirmed in the first power of attorney, was not limited in any way by the second, as Miller testified, it was error for the Court to refuse to charge the jury "that if they believe the testimony of Mr. Miller to the effect that the second power of attorney was not intended to limit the first power of attorney they must acquit" (R. 128). For similar reasons it was error for the Court to deny defendant's motion for a directed verdict (R. 123). Prussian had the authority to endorse the draft and his acts, therefore, did not constitute the crime of forgery.

In concluding this discussion petitioner wishes to again point out how exceedingly dangerous it is to stretch the crime of forgery to cover circumstances of this kind. Prussian undoubtedly believed he had the authority to sign Mackay's name. We have shown his justification for such belief. If he had been charged with some crime other than forgery, proof of his honest belief that he was entitled to deduct his fees or that there had been a subsequent ratification by his client would have been material and relevant. Instead, such evidence was ruled out or ignored (R. 35, 36) and the channels closed for such discussion—because the charge was forgery. It is dangerous legal reasoning to conclude that every act of signing another's name constitutes the crime of forgery.

CONCLUSION.

The petitioner submits that the decision of the Circuit Court of Appeals was erroneous and, in view of the extreme importance of the questions herein involved, prays that a writ of certiorari be granted and this Court review the decision of the Circuit Court and finally reverse it.

Respectfully submitted,

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